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Nos. 90-29
90-389
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS,

Petitioner,

v.

DANIEL L. MEDLOCK, *et al.*,

Respondents,

- and -

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF AMICI CURIAE CABLEVISION INDUSTRIES CORP., COMCAST CORPORATION, AND COX COMMUNICATIONS, INC. IN SUPPORT OF PETITIONERS-RESPONDENTS DANIEL L. MEDLOCK, *ET AL.*

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QUESTION PRESENTED

In Arkansas, a three percent state sales tax is imposed on cable television subscriptions. Under the State's taxing scheme, newspapers, magazines, and television and radio broadcasting are not subject to this tax. The question presented is whether, absent a compelling State interest, this differential taxation of cable television violates the guarantees of freedom of speech and of the press under the First Amendment to the United States Constitution.

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INTEREST OF AMICI

Cablevision Industries Corp. ("Cablevision"), Comcast Corporation ("Comcast"), and Cox Communications, Inc. ("Cox") are three of the largest multisystem cable television operators in the United States. Cablevision owns or has management responsibility for cable television systems in 18 states[1] which serve approximately one million subscribers. Comcast owns and has management responsibility for cable television systems in 18 states[2] which serve more than 2.5 million subscribers. Cox operates cable television systems in 16 states[3] and provides cable television to more than 1.5 million subscribers.[4]

As described below, 12 states tax the cable television operations of Cablevision, Comcast, and Cox but do not subject other mass communicators, such as newspapers, magazines, and broadcasters, to these taxes. These taxing structures are generally of recent

[1] The states in which Cablevision operates cable television systems include Alabama, California, Florida, Georgia, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

[2] The states in which Comcast owns or has management responsibility for cable television systems include Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, New Jersey, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia.

[3] The states in which Cox operates cable television systems include California, Connecticut, Florida, Georgia, Illinois, Iowa, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Virginia, and Washington.

[4] Letters from the parties to this proceeding consenting to the filing of this brief have been filed with the Clerk of this Court.

vintage as one state after another has begun to single out cable television as a source of increased revenue. They have been and continue to be the subject of administrative and judicial First Amendment challenges in the various states. The decision in this case will establish the constitutional guidelines against which existing taxes will be judged and by which state legislatures will be guided in structuring future taxing schemes. Most importantly, then, this case concerns the right of cable television operators to communicate information and ideas on the same basis as other mass communicators, free of the inhibiting effects of differential taxation.

STATEMENT OF THE CASE

Since 1941, Arkansas has imposed a sales tax on all tangible personal property and on certain enumerated services. In 1987, the Arkansas General Assembly adopted Act 188 of 1987, amending the Arkansas Gross Receipts Tax of 1941 by adding cable television service to the list of services subject to the tax. Ark. Stat. Ann. § 26-52-301(3)(D) (1987). Subsection (D) provided for the levy of a three percent tax upon gross proceeds or gross receipts derived from sales of cable television services. *Id.*[5] Section 26-52-401 expressly exempted from the sales tax: (1) gross receipts or gross proceeds derived from the sale of newspapers; (2) gross proceeds derived from sales of advertising space in newspapers and publications and

[5] Other services subject to the sales tax include telephone service; the service of furnishing rooms by hotels, apartments, lodging houses, and tourist camps; and the service of alteration, addition, cleaning, refinishing, replacement, and repair of motor vehicles. Ark. Stat. Ann. § 26-52-301(3).

billboard advertising services; and (3) religious, professional, trade and sports journals and publications printed and published within the State and sold through regular subscriptions. Ark. Stat. Ann. §§ 26-52-401(4), (13), (14).[6] On March 21, 1989, by Act 769, the Arkansas General Assembly further amended the gross receipts tax to include satellite broadcast television subscription services[7] within the provision taxing cable television service.[8]

Petitioners-Respondents Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc. (hereinafter "the Medlock

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[6] Notwithstanding this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), section 26-52-401 has never been amended to expand the exemptions from the sales tax to include all subscription magazines.

[7] Satellite broadcast television systems, also known as satellite master antenna television (hereinafter "SMATV") systems, employ a central dish antenna that receives television signals from a satellite in fixed orbit. Satellite dish antennas may be located at the building site, or signals may be received by microwave through small receiving antennas on top of the building. The signal is thereafter distributed by wire to subscribers who pay a fee for the service.

[8] As amended by Act 769, effective July 1, 1989, the tax applied to "community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers . . . ." Ark. Stat. Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Because the Arkansas legislature did not enact a corresponding amendment to the Arkansas use tax, subscription fees for SMATV are subject to Arkansas's sales tax only when they are paid to an in-state collecting agent, *e.g.*, a local cable operator. Subscription fees charged for SMATV to subscribers located in Arkansas, therefore, are not taxed when they are paid by the Arkansas subscriber directly to an out-of-state provider.

petitioners") challenged Act 188 as violative, *inter alia*, of their rights of freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution. The trial court applied the four prong test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), for determining whether governmental regulation passes constitutional muster under the First Amendment, and held that Arkansas's stated interest in raising revenues was a sufficiently compelling governmental interest to justify the burden of the tax on cable television operators' First Amendment rights. *Medlock v. Pledger*, No. 87-2401 (Ch. Ct. Pulaski Cty., Div. 1, Mar. 10, 1989), *reproduced in* Petition for Certiorari at 20a-21a, *Medlock v. Pledger* (No. 90-38).

On appeal to the Arkansas Supreme Court, the Medlock petitioners requested a finding that the Arkansas taxing scheme was unconstitutional because both before and after its amendment it taxed the provision of cable service while exempting the sale of newspapers and other publications. The Arkansas Supreme Court found the tax on cable television to be unconstitutional prior to the 1989 amendment, but on a narrower ground. The court reasoned that it did not apply to SMATV and "a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment . . . ." *Medlock v. Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 41 (1990), *and cert. granted*, ___ U.S. ___, 111 S. Ct. 42 (1990).[9] According to the court, the

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[9] The court concluded that the mere fact that cable service uses public rights-of-way is irrelevant to a determination of

inclusion of SMATV within the provision taxing cable television by Act 769 cured the constitutional infirmity. *Id.*

Notwithstanding this conclusion regarding the constitutionality of the tax as amended, the court professed an unwillingness to consider the Medlock petitioners' position that the tax impermissibly differentiated between cable television and newspapers and magazines because that would have called into question the validity of Act 769, which had not been before the trial court and, therefore, was not before the Arkansas Supreme Court. *Id.* The court nonetheless went on to state its opposition to a holding that "all mass communications media must be taxed in the same way." *Id.*

SUMMARY OF THE ARGUMENT

This case concerns the differential taxation of cable television in Arkansas. Many other state taxing schemes also single out cable television for taxation or treat cable differently from other communications media for taxing purposes. While other forms of media such as newspapers and magazines may be taxed, the tax must be a generally applicable one, and this Court's decisions hold that for a differential tax on newspapers and magazines to survive constitutional scrutiny, it must further a substantial governmental interest. There is no justification under the First Amendment for differential treatment of cable television in the taxing area. Providers of cable television service engage in the same types of First Amendment

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whether the sales tax on cable service, which exempts other communications media, is constitutional. 301 Ark. at 485-86, 785 S.W.2d at 203.

activity as do other mass communicators, such as newspapers, magazines, and radio and television broadcasters. In providing news, information, entertainment, and other ideas, cable television operators have the very same First Amendment rights as other media providers, and the rights of some media providers are not more worthy of protection than others. Thus, cable television operators, like newspapers and magazines, are also entitled to have their First Amendment rights protected from the unwarranted burdens of discriminatory state and local taxing schemes.

In determining whether cable television operators are entitled to First Amendment protection from differential taxation, the Court need not determine the full extent of First Amendment protection for cable television in all areas of economic regulation, including such matters as franchising and access.[10] Equally so, in order to protect cable television from the inhibiting effects of differential taxation presented by this case, the Court need not conclude generally that

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[10] Indeed, this is not the appropriate case for the Court to determine the extent of First Amendment protection for cable television in any areas other than taxation. As the Court recognized in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), before the Court can resolve the constitutional issues concerning cable television in the franchising area, the factual issues unique to a franchising case must be fully developed. Consequently, in *Preferred Communications* the Court remanded the case to the United States District Court for the Central District of California for development of the record with regard to the uses of the public utility poles and rights-of-way and how the petitioner cable company proposes to install and maintain its facilities on them. *Id.* at 496. That case is pending before the district court.

cable television is an "electronic newspaper" or "magazine" for all regulatory purposes such that the First Amendment implications affecting the regulation of the print media are also applicable to cable. Whatever unique special characteristics might justify other regulatory measures on cable television which would not be justified with respect to other media, they certainly do not justify burdening cable television operators with differential taxation. Accordingly, the Court should hold the Arkansas sales tax on cable television, both before and after its amendment, constitutionally impermissible because it discriminates against cable television without advancing a sufficiently compelling governmental interest.

ARGUMENT

I. Cable Television Is Subject to Differential Taxation Under the Taxing Schemes of Numerous States.

Cablevision, Comcast, and Cox are subject to a broad array of state and local taxing schemes that tax cable television differently from other mass communications media. A non-exhaustive summary of these taxing schemes follows:

1. Florida, Nebraska, Rhode Island, South Carolina, and Texas each impose a sales tax on cable television service.[11] The sales tax rates are five and six percent, with some localities within the states levying an additional .5 percent to 2.5 percent sales tax. In each

[11] *See* Fla. Stat. Ann. § 212.05 (West 1989); Neb. Rev. Stat. §§ 77-2702, 2703 (1986); R.I. Gen. Laws §§ 44-18-12, 13, 18 (1989 & Supp. 1990); S.C. Code Ann. §§ 12-35-140, 510 (Law. Co-op. 1976); Tex. Tax Code Ann. §§ 151.0101, .051 (Vernon 1982 & Supp. 1990).

of these states newspaper circulation and advertising are exempted by statute from the sales tax.[12] In addition, Florida, Nebraska, Rhode Island, and Texas exempt certain newspaper production materials, supplies, equipment, and other items involved in the production of newspapers from the sales tax.[13]

2. In Pennsylvania, cable television is subject to both capital stock and sales taxes. Pennsylvania taxes corporations at the rate of nine mills upon each dollar of defined capital stock value. 72 Pa. Cons. Stat. Ann. § 7602 (Purdon 1990). The tax exempts the corporate stock of entities organized for manufacturing or processing. "Processing" is defined to include the publishing of books, newspapers, magazines or other periodicals, printing, and broadcasting radio and television programs by licensed commercial or educational stations. *Id.* § 7601(11).

In addition, Pennsylvania exempts from its sales and use tax all transfers for the purpose of manufacturing and processing. *Id.* § 7201. Under the sales tax exemption, "processing" is defined to include the broadcasting of radio and television programs of licensed commercial and educational stations. The Pennsylvania Department of Revenue regulations defining "licensed commercial or educational stations"

[12] *See* Fla. Stat. Ann. § 212.08(7)(w) (West 1989); Neb. Rev. Stat. § 77-2704(d) (1986); R.I. Gen. Laws § 44-18-30(B) (Supp. 1990); S.C. Code Ann. § 12-35-550(7) (Law. Co-op. Supp. 1989); Tex. Tax Code Ann. §§ 151.319(a), (f) (Vernon 1982 & Supp. 1990).

[13] *See* Fla. Stat. Ann. § 212.08(7)(v)(2) (West Supp. 1990); Neb. Rev. Stat. § 77-2702(11)(a) (1986); R.I. Gen. Laws § 44-18-30(H) (Supp. 1990); Tex. Tax Code Ann. § 151.319(d) (Vernon 1982 & Supp. 1990).

and "broadcast" specifically provide that registered cable television companies operating under the authority of the Federal Communications Commission ("FCC") are not considered licensed commercial or educational stations.[14] Accordingly, cable television operators are subject to both the capital stock and sales taxes, whereas newspapers, magazines, and radio and television broadcasters are not.

3. In Connecticut, cable television service is subject to an eight percent sales tax, although other regulated services including gas, water, and most electric services are exempt. Conn. Gen. Stat. §§ 12-407, 12-412(3) (1989). The sales tax does not reach certain other suppliers of video programming, such as SMATV, direct broadcast satellite ("DBS"),[15] multichannel, multipoint distribution systems ("MMDS"),[16] and satellite services. Newspapers and subscription

[14] A recent decision of the Commonwealth Court of Pennsylvania held that there is no statutory difference between a cable television operator and a licensed commercial or educational station and, therefore, that cable is entitled to the statutory exemption for both the capital stock and the sales and use taxes. An appeal of this decision is pending in the Pennsylvania Supreme Court. *Suburban Cable TV Co. v. Commonwealth*, 131 Pa. Commw. 368, 570 A.2d 601 (1990), *juris. noted*, Pa. Sup. Ct., Sept. 4, 1990.

[15] DBS systems permit individuals to receive satellite delivered television programming through a small receiving dish antenna for a subscription fee.

[16] MMDS involves over-the-air microwave transmission of television programming from one point to multiple receiving points. Since line of sight, or direct or unobstructed, transmission is required, subscribers require a rooftop apparatus to receive the microwave transmissions.

magazines are also exempt from the sales tax. *Id.* § 12-412(6).

In addition, cable operators are subject to a gross earnings tax, although generally exempt from personal property taxes. *Id.* §§ 12-256, 12-268. Prior to January 1, 1990, both cable operators and regulated telecommunications services were subject to a nine percent gross earnings tax and both were exempted from personal property taxes. Since January 1, 1990, cable operators have been subject to a five percent gross earnings tax, whereas regulated and unregulated telecommunications services are not subject to the tax. Video programming providers of SMATV, DBS, MMDS, and satellite services are not subject to the gross earnings tax. Nor are newspapers, magazines, and broadcast television. Although cable television operators are exempted from personal property tax and other communications media are not, the gross earnings and personal property taxes tax cable television operators differently from other communications media.

4. In 1990, the Kentucky General Assembly amended the utility tax to make cable television subject to the tax. Ky. Rev. Stat. Ann. § 160.614 (Michie/Bobbs-Merrill Supp. 1990). The tax levied is up to three percent of the utility's gross receipts. *Id.* § 160.613 (Supp. 1990). Initially, the Governor of Kentucky proposed amending the general sales tax to include cable television, radio, broadcast television, and newsprint services and advertising. This proposal was defeated and, subsequently, the legislature amended the utility tax to include only cable television. Unlike other utilities subject to the tax, however, cable television is not permitted to pass the three

percent tax through to its customers. *Compare* Ky. Rev. Stat. Ann. § 160.613 *and* § 160.617 *with* § 160.614 (Michie/Bobbs-Merrill 1987 & Supp. 1990).

In addition, cable television is subject to the Kentucky public service tax. Ky. Rev. Stat. Ann. § 136.120 (Michie/Bobbs-Merrill 1982 & Supp. 1990). The public service tax serves to classify a subject entity's property for purposes of *ad valorem* taxes. *See id.* Under the property classification scheme, a cable system's property is divided into three categories: (i) operating property; (ii) non-operating tangible property; and (iii) non-operating intangible property. *Id.* § 136.120(2). The first two categories are subject to both state and local property taxes, whereas the third category is subject only to state property taxes. *Id.* Operating property is specifically defined to include both operating tangible property and the franchise. *Id.* § 136.115(2) (Michie/Bobbs-Merrill 1982). Thus, cable television alone, unlike any other medium of mass communication such as newspapers, magazines, and radio and television broadcasting, is subject to taxation on its goodwill and going concern value by the State at the rate for tangible property of 45¢ per $100 of value, with county and local rates currently adding up to an additional 90¢ per $100 of value. Other mass communications media are not taxed on these intangible assets, regardless of whether they were generated over time or acquired. *Id.* § 136.120 (Michie/Bobbs-Merrill Supp. 1990).

5. Indiana imposes a gross income tax on the gross receipts a taxpayer receives from trades, businesses or commerce in Indiana. Ind. Code Ann. § 6-2.1-1-2(a) (West 1989). Virtually all enterprises in Indiana, including cable television operators, radio and television

broadcasters, and members of the newsprint media, are subject to the tax. Although all members of the mass communications media in Indiana are subject to the tax, cable operators are taxed at the higher rate of 1.2 percent, whereas other media are taxed at the lower rate of .3 percent.

Indiana also imposes an excise tax of five percent on gross retail income. *Id.* § 6-2.5-2-1. The tax applies to each "retail merchant" who is defined as "[a] person . . . making a retail transaction when he engages in selling at retail." *Id.* § 6-2.5-4-1(a). Cable television operators are included specifically in the definition of retail merchants. *Id.* § 6-2.5-4-11. The advertising sales of radio and television broadcasters are not subject to the tax by definition. Newspaper sales are expressly exempted from the tax.

6. Michigan imposes a use tax for "the privilege of using, storing or consuming tangible personal property in" the State of Michigan. Mich. Comp. Laws Ann. § 205.93(1) (West 1986). The tax is equal to four percent of the price of the property. The statute specifically exempts "[p]roperty purchased by persons licensed to operate a commercial radio or television station when the property is used in the origination or integration of the various sources of program material for commercial, radio or television transmission." *Id.* § 205.94(o) (Supp. 1990). The Michigan Department of Revenue has concluded that the phrase "licensed to operate a commercial radio or television station," does not include cable television systems because they are not "licensed" by the FCC.

7. In California, intangible assets are exempt from property taxation, and businesses other than cable television, including non-cable media, are not taxed

on their intangible assets. As part of the tax on their tangible personal and real property, cable television operators are taxed on the possessory interests they are held to have in the public rights-of-way they utilize under their franchises in constructing and operating their cable systems. Cal. Rev. & Tax. Code, § 107.7 (Deering 1989). Some county assessors have ignored the intangible asset exemption and equate the value of the possessory interest of a cable television system with the market value or purchase price of the entire cable system, which includes the value of intangible assets such as the operator's franchise or license to engage in the cable television business. The property tax assessments of newspapers, magazines, and radio and television broadcasters do not include taxation of such intangible assets.

8. In Virginia, a number of local governments require cable television operators to pay a business license tax, in addition to the franchise fee authorized by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, 543 (1988). Businesses engaged in "printing or publishing any newspaper, magazine, newsletter or other publication . . . or operating or conducting any radio or television broadcasting station or service" are exempted from paying the business license tax. Va. Code Ann. § 58.1-3703(B)(3) (Supp. 1990).

In addition, the City of Norfolk recently amended Norfolk City Ordinance No. 36,026 to include cable television service within the definition of "utility service." As a result, cable television service is additionally taxed as a utility at a rate of seven percent, excluding any charge made for remote control tuning

devices. No other mass communications media are subject to the utility tax.[17]

II. A Sales Tax on Cable Television Service That Exempts Newspapers and Subscription Magazines Violates the First Amendment to the Constitution of the United States by Singling Out Cable Television for Differential Taxation.

A. The Constitutionality of a Tax on Cable Television Must Be Determined Under the *Minneapolis Star* and *Arkansas Writers' Project* Principles.

The examples of state taxing schemes described in Section I above present a variety of ways in which states have singled out cable television from among other mass communications media and subjected it to differential taxation. For the reasons set out in this section, such schemes, like the Arkansas sales tax on cable television, must be judged by the standards articulated in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Cable television operators engage in conduct protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *cert. denied sub nom. National*

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[17] Many of these state taxing schemes further burden cable television operators because the disputed tax must be paid before the tax assessment can be challenged. In California, for example, a cable operator may be required to pay millions of dollars in disputed taxes and then sue for a refund. Even if the taxpayer prevails and is entitled to a refund, the interest paid on the refunded monies is at a rate less than the State has earned on the refunded amount.

Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). The business of cable television, like that of broadcasters, newspapers, and magazines, is to make available to the public a mixture of news, information, and entertainment. Like these entities, cable television operators, such as Cablevision, Comcast, and Cox, editorially select and retransmit local broadcast signals, choosing stations to carry from among the three major network affiliates, Fox affiliates and other commercial independents, and local public television stations. In addition, amici select signals from distant independent, specialty, and educational broadcast stations. Amici make editorial decisions regarding the selection of program networks via satellite, such as Home Box Office, CNN, and C-SPAN, as well as satellite-delivered pay-per-view services. Finally, amici provide programming of their own creation and facilitate the transmission of locally originated programming, including local news events, community features, and live or videotaped public service and entertainment programs.[18]

As a result of cable television's expanded role in more recent years, it is now settled that "the activities . . . [of cable television] plainly implicate First Amendment interests." *Preferred Communications*, 476 U.S. at 494.[19] As this Court stated:

[18] Indeed, there is no substantive difference between these editorial decisions and those made, for example, by newspapers in determining which wire service articles to reprint and which syndicated columns to publish.

[19] The Court's conclusion is consistent with the opinion of Congress, as expressed in the legislative history of the Cable Com-

> [T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable] seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." [citation omitted] Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting, Co. v. FCC*, ...

475 U.S. at 494-95. It is not surprising, therefore, that cable television generally has been accorded a

munications Policy Act of 1984:

> As we enter the "information age" access to telecommunications networks has become increasingly important to full participation in the political, economic, social and cultural life of the nation. The First Amendment's guarantee of a free flow of diverse ideas will be reduced to an empty promise if access to information is not available to all our citizens.

H.R. Rep. No. 98-934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 4673. If the current trend of singling out cable television for taxation continues unchecked, the corresponding increase in the cost of services will push cable access beyond the reach of many Americans, contrary to Congress's express desire.

high level of constitutional protection. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (holding that "must-carry" rules must, at the very least, "advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end.") (citing *O'Brien*, 391 U.S. at 377), *cert. denied sub nom. Office of Communication of United Church of Christ v. FCC*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc.*, 768 F.2d 1434 (ruling that the "scarcity doctrine" does not apply to cable television and that cable "must-carry" rules therefore must withstand greater scrutiny than is applied to broadcast media access regulations; *Century Federal, Inc. v. Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) (applying *O'Brien* test in holding exclusive cable franchising agreement unconstitutional).

The present case, however, does more than implicate First Amendment interests. In *Preferred Communications*, the question was whether someone desiring to provide cable television service, and denied a franchise to do so because of a city-imposed limit on the number of cable franchises, had presented a colorable First Amendment claim sufficient to survive a motion to dismiss. This case concerns those who have acquired cable television franchises and are in fact engaging in "speech and the communication of ideas." Cable television operators are thus exercising the very "rights protected under the First Amendment" addressed in *Minneapolis Star*, 460 U.S. at 582 and *Arkansas Writers' Project*, 481 U.S. at 227-32.

It is equally true that any tax to which cable operators are subject imposes some burden on their First

Amendment rights.[20] Since the protection of their First Amendment rights is at issue here, the principle of *Minneapolis Star* and *Arkansas Writers' Project* that a taxing scheme which discriminates among members of the press is unconstitutional is equally applicable to a taxing scheme such as the present one which singles out cable television for taxation while exempting newspapers and magazines. In *Minneapolis Star*, the Court stated the operative rule:

> A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. [citation omitted] Any tax that the press must pay, of course, imposes some "burden."

460 U.S. at 582-83. The *Minneapolis Star* two-part inquiry thus should be undertaken to determine whether the burden of the Arkansas sales tax on cable television is permissible: first, under the tax scheme at issue, is cable television merely subject to a tax of general applicability or has it been "singled out" for "special treatment"; and, second, if cable is the subject of differential tax treatment, has the State

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[20] This, of course, does not mean that cable television is free from taxation or other economic regulations. Rather, it means that it is subject to generally applicable taxes, as are newspapers and magazines, and other legitimate economic regulations. Such generally applicable economic regulations include antitrust laws, the Fair Labor Standards Act, and enforcement of subpoenas. *Minneapolis Star*, 460 U.S. at 581. Such regulations do not single out First Amendment speakers, but apply generally to all businesses.

met its burden of demonstrating that the tax "is necessary to achieve an overriding governmental interest." 460 U.S. at 582.

B. Judicial Decisions Applying *Minneapolis Star* and *Arkansas Writers' Project* Support Their Application in This Case.

Recently, state and lower federal courts have applied this Court's *Minneapolis Star* and *Arkansas Writers' Project* principles to invalidate taxing schemes that discriminate among, as well as against, mass media communicators. For example, the Florida Supreme Court held that a sales tax on magazines which exempted newspapers violated the First Amendment. *Department of Revenue v. Magazine Publishers of America, Inc.*, ___ Fla. ___, 565 So.2d 1304 (1990). Using the strict scrutiny standard, the Florida court determined that the differential taxation was constitutionally impermissible because the State could not identify a counterbalancing interest of compelling importance that it could not achieve through means other than differential taxation. *Id.* at 1308. The only interest the State asserted to justify the scheme was the public interest in promoting publishers who engage in the immediate dissemination of news. That interest was rejected by the court. *Id.* at 1308-09.

These decisions are not limited to discriminatory taxation affecting the print media. The Oklahoma Supreme Court recently held that a tax structure which taxed broadcasters but exempted the print media violated the First Amendment. *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Comm'n*, ___ Okla. ___, 789 P.2d 1312 (1990).[21] The Oklahoma court stated

[21] In *Oklahoma Broadcasters*, three taxation schemes were

that while both *Minneapolis Star* and *Arkansas Writers' Project* found First Amendment violations resulting from differential tax schemes between members of the print media, "there is nothing to suggest that this court should, without sufficient justification, approve preferential treatment of print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press." *Id.* at 1316 (emphasis in original).

A New York appellate court has also held that treating print media and broadcast media differently by imposing a franchise tax on all advertising income

challenged: (i) an excise tax on the gross receipts or gross sales of licensing agreements to exhibit motion pictures or to receive images for telecast that did not extend to comparable licensing agreements entered into by newspapers and radio broadcasters; (ii) a sales tax on gross receipts of sales of advertising that contained an exemption for the sale of advertising space in newspapers, periodicals, and billboards; and (iii) a sales tax that applied to purchases of broadcasting equipment but which exempted purchases of equipment used in the production of newspapers. The excise tax on licensing agreements was held to be unconstitutional because the only difference between the licensing agreements of radio broadcasters and newspapers from television broadcasters was the manner in which the material subject to the agreement is finally presented to the licensee. ___ Okla. at ___, 789 P.2d at 1316-17. The sales tax on advertising failed since the sale of the advertising service by broadcasters was taxed, while the sale of the same service by a newspaper was exempt. The court found no merit in the tax commission's argument that the result was permissible because broadcast media has been subject to a higher degree of regulation than print media. *Id.* The tax on broadcasting equipment was also found to be constitutionally infirm. The court rejected the tax commission's distinction that print media produces a tangible product while broadcast media does not. *Id.*

of magazine publishers did not serve a compelling interest and violated the First Amendment. *McGraw-Hill, Inc. v. State Tax Comm'n*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (1989), *aff'd*, 75 N.Y.2d 852 (1990). The court stated that "a taxing scheme which taxes some members of the press but exempts others of the press does not escape 1st Amendment scrutiny even if businesses outside the press are also not exempt." 146 A.D.2d at 375, 541 N.Y.S.2d at 255. The tax commission argued that the unique nature of the electronic media makes it more susceptible to governmental regulations and that there are many differences between the print and visual media. "While that may be true," the court ruled that "such an argument fails to show any compelling State interest in taxing the two types of media differently." *Id.*

C. The Arkansas Sales Tax on Cable Television Is Constitutionally Infirm.

1. Arkansas Has Singled Out Cable Television for Special Tax Treatment.

The Arkansas sales tax suffers from the type of discrimination identified in *Minneapolis Star* because it taxes cable television differently from other communications media. Section 26-52-301 levies an excise tax of three percent on the gross proceeds or gross receipts derived from all sales to any person of cable television services. The tax targets cable television as compared to other communications media because the sales tax does not apply to any other mass media communicator with which cable television directly competes.[22] For example, program distribution via tel-

[22] As amended by Act 769 of 1989, the tax was made to apply to SMATV.

evision or radio, *i.e.*, the advertising transaction that funds the program distribution, is not covered by the tax. Nor does the tax apply to newspaper sales; sales of advertising space in newspapers and publications and billboard advertising services; and religious, professional, trade, and sports journals and publications printed and published within the State and sold through regular subscriptions.[23]

These preferences for newspapers and subscription magazines make this case analogous to *Oklahoma Broadcasters*; for as in that case there is no justification for "approv[ing] preferential treatment of the print media" over cable. ___ Okla. at ___, 789 P.2d at 1316. The magazine and newspaper exemptions mean that only a few members of the Arkansas communications media pay any sales tax. This type of discrimination poses a particular danger of abuse by the State:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the state imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

Minneapolis Star, 460 U.S. at 585. Accordingly, as with the discriminatory taxes in *Minneapolis Star* and

[23] The proceeds of the over-the-counter sale of books and magazines are subject to the tax. As previously noted, the tax has not been amended to exempt all subscription magazines in accordance with the decision in *Arkansas Writers' Project*.

Arkansas Writers' Project, the State must demonstrate that the discriminatory tax on cable meets a heightened level of scrutiny before it passes constitutional muster.[24]

2. Arkansas Has Failed To Meet Its Burden of Demonstrating a Substantial Justification for the Differential Taxation of Cable Television.

Because the differential taxation of cable television under the Arkansas statute imposes acute burdens on rights protected by the First Amendment, the regulation must withstand a high level of constitutional scrutiny. Where a First Amendment violation is alleged, "the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *Preferred Communications*, 476 U.S. at 496. Such infringements "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*

[24] Petitioner-Respondent Pledger, in his Petition for Certiorari in Docket No. 90-29, asserts that because the Arkansas legislature was unaware of the existence of SMATV, the unconstitutionality of the tax is at least partially ameliorated. Petition for Certiorari at 8-13, *Pledger v. Medlock* (No. 90-29). Evidently, Pledger believes that unconstitutional regulations may validly be enforced as long as the legislature in question is unaware of the consequences of its actions. This position raises the adage "ignorance is bliss" to a unique place in constitutional jurisprudence.

In support, *Pledger* cites only *Katzenbach v. Morgan*, 384 U.S. 641 (1966), arguing it stands for the proposition that "legislative findings of fact" must be given "due respect" in making judicial determinations. Petition for Certiorari in No. 90-29 at 11. The alleged obliviousness of the Arkansas legislature to the existence of SMATV, however, cannot be considered a "finding of fact." It was at best an oversight, and is entitled to no deference.

v. Valeo, 424 U.S. 1, 63 (1976). The interest served must be "paramount, one of vital importance, and the burden is on the government to show [its] existence . . . ." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In serving the asserted interest, the regulation must be narrowly drawn to avoid imposing unnecessary burdens on the protected First Amendment rights. *Id.* at 363.

Consonant with these principles, the Court in *Minneapolis Star*, following "a long line of precedents," stated that regulations burdening First Amendment rights can survive only if "the governmental interest [served] outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly."[25] 460 U.S. at 585 n.7. Thus, a differential tax scheme which burdens First Amendment rights is invalid unless "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585.

[25] The line of cases followed in *Minneapolis Star* illustrates the diversity of First Amendment interests to which this standard applies. The three cases cited specifically by the Court all involved burdens on different First Amendment rights. In *United States v. Lee*, 455 U.S. 252 (1982), the Court applied the standard in assessing the constitutionality of the federal social security tax in light of its burden on the free exercise of religion. *United States v. O'Brien*, 391 U.S. 367 (1968), was concerned with restrictions on "symbolic speech" resulting from a regulation prohibiting the burning of draft cards. Finally, *NAACP v. Alabama*, 357 U.S. 449 (1958), applied the standard in a case involving infringement of the First Amendment freedom of association. These cases make it clear that the standard applied in *Minneapolis Star* controls not only in cases where the rights of the print media are concerned, but in *all* cases involving the infringement of First Amendment rights.

The compelling interest advanced by Arkansas in the present case was articulated by the Arkansas legislature as the need "to provide adequate funding for schools and other essential services required by the citizens" of the state. Act 188 of 1987, § 3. As recognized by this Court in *Minneapolis Star*, the interest of Arkansas in raising revenue for essential services is "critical to any government." 460 U.S. at 586. The Arkansas sales tax, however, fails the test enunciated in *Minneapolis Star* because this interest can be served by means less burdensome to First Amendment rights. A sales tax of general applicability would serve the stated interest while avoiding the First Amendment burden inherent in a tax which singles out cable television for discriminatory treatment.[26] *See Minneapolis Star*, 460 U.S. at 586; *Arkansas Writers' Project*, 481 U.S. at 231-33.

Nor will a lack of improper motive on the part of the State cure the unconstitutionality of the tax. Whether or not the Arkansas legislature intended to

[26] Respondent Pledger has argued that the challenged tax meets the requirement that regulations burdening First Amendment rights must be narrowly drawn because the tax "goes no further than necessary to advance the 'important or substantial interest' of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens." Brief in Opposition to Petition for Certiorari at 5, *Medlock v. Pledger* (No. 90-38). Pledger misapprehends the meaning of the requirement. The question is not whether the State has demanded greater revenues from cable television than it actually needs to fund its schools and other services. The question is whether Arkansas has impermissibly burdened First Amendment rights by singling out cable television to provide the desired monies. The answer, as explained in both *Minneapolis Star* and *Arkansas Writers' Project*, is yes.

discriminate against cable operators is irrelevant. As stated in *Minneapolis Star*, the motives of the legislature need not be impugned since "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592 (citations omitted). The Arkansas sales tax is not narrowly drawn to achieve the stated government interest. It, therefore, must be struck down as unconstitutional.

CONCLUSION

The judgment of the Arkansas Supreme Court holding unlawful the sales tax placed on cable television services by Act 188 of 1987 should be affirmed. To the extent the Arkansas Supreme Court ruled that the tax placed on cable television services as amended by Act 769 of 1989 was lawful, such ruling should be reversed.

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